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No. 01-1618

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL ABBELL AND WILLIAM MORAN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Federal Rule of Criminal Procedure 23(b) and the Sixth Amendment's guarantee of a verdict by an impartial, unanimous jury prohibit the discharge of a deliberating holdout juror through a process in which the court (i) questions all members of a jury about their deliberations, and (ii) makes credibility determinations and subjectively decides--based on a patently ambiguous record of those deliberations--that there is no "substantial possibility" that the juror is being discharged for her views about the merits of the Government's case.

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

This *amicus curiae* brief is submitted in support of the petition for a writ of certiorari filed by petitioners Michael Abbell and William Moran. The consents of the parties are submitted with the brief in accordance with Sup. Ct. R. 37.2(a).[1/]

INTEREST OF *AMICUS CURIAE*

The NACDL is a District of Columbia non-profit organization whose membership is comprised of over 10,000 lawyers and 28,000 affiliate members representing every state. The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts.

The NACDL is the only national bar organization working on behalf of public and private criminal defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

[1/] As required by Rule 37.6 of this Court, *amicus curiae* submits the following statement: no party authored this brief in whole or in part; and no person or entity, other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

The NACDL rarely participates as *amicus* at the petition stage. It does so in this case because the issue presented has transcendent importance, and because, in our judgment, the court of appeals' decision threatens to undermine the crucial protections of the Sixth Amendment right to trial by jury and to invite trial courts to invade the secrecy of jury deliberations. We believe that the perspective of our members, who regularly represent criminal defendants in federal and state trial courts, will be useful to the Court.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ of certiorari because the court of appeals' decision conflicts with decisions from other circuits and resolves, incorrectly and with little analysis, issues of extraordinary importance concerning a criminal defendant's Sixth Amendment right to trial by jury. Contrary to *United States* v. *Brown*, 823 F.2d 591 (D.C. Cir. 1987), *United States* v. *Thomas*, 116 F.3d 606 (2d Cir. 1997), and *United States* v. *Symington*, 195 F.3d 1080 (9th Cir. 1999), the court of appeals' decision permits a district court to interrupt jury deliberations and conduct an intrusive investigation into allegations that a juror intends to nullify on the basis of an ambiguous complaint by other jurors. The decision significantly misstates the high evidentiary hurdle that *Brown* and *Thomas* have set before an allegedly nullifying juror may be removed from a deliberating jury. And the decision undermines even its watered-down version of the *Brown/Thomas* standard by affording almost complete deference to the trial court's removal decision. The Court should grant certiorari to address these issues.

I. THE *BROWN* AND *THOMAS* STANDARD FOR REMOVAL OF AN ALLEGEDLY NULLIFYING JUROR.

Courts uniformly recognize the *power* of the jury to nullify--to acquit in purposeful disregard of the law and the facts. *See, e.g., Horning* v. *District of Columbia*, 254 U.S. 135, 137-40 (1920); *United States* v. *Funches*, 135 F.3d 1405, 1408-09 (11th Cir. 1998). With equal uniformity, however, courts hold that jurors have no *right* to nullify. Thus, most courts refuse to instruct the jury on its nullification power or to permit defense counsel to argue explicitly for nullification. *See, e.g., Funches*, 135 F.3d at 1409. Because jurors have no right to nullify, courts have held that a juror's expressed determination to acquit regardless of the facts and the law constitutes "just cause" for removal under Fed. R. Crim. P. 23(b). *See, e.g., Thomas*, 116 F.3d at 617; *United States* v. *Geffrard*, 87 F.3d 448, 452 (11th Cir. 1996).

Although a trial court may remove a nullifying juror under Rule 23(b), courts generally are reluctant to investigate allegations made during deliberations that a juror intends to nullify. This reluctance arises from the intrusive (and often inconclusive) investigation that an inquiry into nullification entails. Such an investigation of a deliberating jury conflicts squarely with the principle--manifested, for example, in Fed. R. Evid. 606(b)--that jury deliberations must remain secret. Courts have recognized that "[o]nce a jury retires to the deliberation room, the presiding judge's duty to dismiss jurors for misconduct comes into conflict with a duty that is equally, if not more, important--safeguarding the secrecy of jury deliberations." *Thomas*, 116 F.3d at 618. "This conflict is especially pronounced . . . where the alleged misbehavior is a purposeful disregard of the law, a particularly difficult allegation to prove and one for which an effort to act in good faith may easily be mistaken." *Id.*

The Second Circuit declared in *Thomas* that "[t]he secrecy of deliberations is the cornerstone of the modern Anglo-American jury system." *Id.* The assurance that juries deliberate in secret, immune from inquiry by the court or the parties, promotes free, open, and candid debate among the jurors. *See, e.g., Tanner* v. *United States*, 483 U.S. 107, 124 (1987) ("[C]ommon fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts.") (quoting legislative history of Rule 606(b)). Indeed, a trial court may "invite[] reversible error" when it investigates "internal influence occurring during deliberations." *United States* v. *Prosperi*, 201 F.3d 1335, 1340-41 (11th Cir.) (citing Fed. R. Evid. 606(b)), *cert. denied*, 531 U.S. 956 (2000).

Judicial intrusion into deliberations presents two principal dangers. First, "if trial judges were permitted to inquire into the reasoning behind jurors' views of pending cases, 'it would invite trial judges to second-guess and influence the work of the jury.'" *Symington*, 195 F.3d at 1086 (quoting *Thomas*, 116 F.3d at 620). Second, "a trial judge's examination of juror deliberations risks exposing those deliberations to public scrutiny. Such exposure, in turn, would jeopardize the integrity of the deliberative process." *Id.*

The *Brown* and *Thomas* courts assigned such great weight to the value of secret deliberations that they adopted an evidentiary standard designed expressly to protect the sanctity of the jury room. Those courts held that "if the record evidence discloses *any possibility* that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." *Thomas*, 116 F.3d at 621-22 (emphasis added); *see Brown*, 823 F.2d at 596 (same); *cf. Symington*, 195 F.3d at 1087 ("any reasonable possibility"). Under the "any possibility" standard, "[a] presiding judge faced with anything but unambiguous evidence that a juror refuses to apply the law as

instructed need go no further in his investigation of the alleged nullification; in such circumstances, the juror is not subject to dismissal on the basis of his alleged refusal to follow the court's instructions." *Thomas*, 116 F.3d at 622.

As this language suggests, the *Brown/Thomas* standard serves two functions. First, it establishes an evidentiary threshold that must be crossed before the district court can investigate a claim of nullification; that is, the court may not undertake an inquiry as long as there is "any possibility" that a complaint about a juror stems from his view of the evidence. *See id.*; *see also Symington*, 195 F.3d at 1087 (when there is any reasonable possibility that the impetus for dismissal stems from the juror's views on the merits of the case, "the trial judge has only two options: send the jury back to continue deliberating or declare a mistrial"). As *Thomas* observes, the "any possibility" standard "protects not only against the wrongful removal of jurors; it also serves to protect against overly intrusive judicial inquiries into the substance of the jury's deliberations." 116 F.3d at 622. Second, *Brown* and *Thomas* establish a substantive rule for determining when a juror may be dismissed under Rule 23(b) for nullification; dismissal may occur only when there is no possibility that the complaints about a juror's conduct result from his position on the merits.

This case amply illustrates the dangers that the *Brown/Thomas* standard serves to prevent. After twenty hours of deliberations, on the basis of a note from two jurors (Gooden and Sebastian) to the effect that another juror (Alfonso) had made up her mind about the case and would not consider contrary evidence (R164-8525-26), the district court launched an investigation that ultimately consumed four days and entailed interviews (in some instances, multiple interviews) of all the jurors, in which they were asked probing questions about Juror Alfonso's statements and opinions. The district court's lengthy interrogation of Juror

Alfonso herself is particularly troubling (R165-8845-68); the court asked her repeatedly whether she would follow the law, apparently refusing to accept her insistence that she would, and even asked her at one point, "What is your concept of the word 'reality'"? R165-8862. Such an extraordinarily intrusive investigation inevitably "bring[s] to bear in some degree, serious, although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded." *Brasfield* v. *United States*, 272 U.S. 448, 450 (1926).

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH *BROWN*, *THOMAS*, AND *SYMINGTON*.

Although the Eleventh Circuit's decision pays lip service to *Brown* and *Thomas* (while ignoring *Symington* entirely), it undermines in three significant respects the procedural and substantive protections of the "any possibility" standard that those decisions adopt.

First, the court of appeals' opinion misstates the *Brown*/*Thomas* standard. The opinion concludes that "a juror should be excused [for nullification] only when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the evidence." *United States* v. *Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001) (citing *Thomas*, 116 F.3d at 621-22, and *Brown*, 823 F.2d at 596). But that is not the standard *Brown* and *Thomas* adopt. As noted above, both cases hold that "if the record evidence discloses *any possibility* that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." *Thomas*, 116 F.3d at 621-22; *Brown*, 823 F.2d at 596 (emphasis added). The phrase "substantial possibility" does not appear in *Thomas*, and it appears in *Brown* only as an assessment of the weight of the evidence in

that case. *See id.* ("The record evidence in this case indicates a substantial possibility that juror Spriggs requested to be discharged because he believed that the evidence offered at trial was inadequate to support a conviction.").[2/]

Second, the court of appeals largely ignores the point that, under *Brown* and *Thomas*, the district court may not initiate an investigation during deliberations on the basis of ambiguous evidence of nullification. The initial note that the court received from Jurors Gooden and Sebastian left open the possibility that their complaints about Juror Alfonso resulted from her view of the evidence. Under *Brown* and *Thomas*, therefore, that note did not permit the district court to undertake further investigation. The district court's questioning of Jurors Gooden and Sebastian after it had given an anti-nullification instruction and after the jurors had sent out notes concerning a possible deadlock was even more clearly unjustified under the "any possibility" standard. And the court's subsequent interrogation of all the jurors cannot possibly be sustained under the *Brown/Thomas* standard. At each of these critical points, the court should have rejected the government's

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[2/] The court of appeals asserts that *Brown* "used both the term 'any possibility' and the term 'substantial possibility'" and concludes that the terms are "interchangeable." *Abbell*, 271 F.3d at 1302 n.14. But *Brown* (as well as *Thomas*) used only the phrase "any possibility" in describing the proper evidentiary standard for excusal of an allegedly nullifying juror, and the addition of the modifier "substantial" plainly (and incorrectly) alters that standard. The Eleventh Circuit's newly-minted "substantial possibility" standard is significantly less strict than the Ninth Circuit's "any reasonable possibility" standard adopted in *Symington*; a possibility can be "reasonable" (that is, based on reason) without being "substantial."

request for a more intrusive investigation, because the "any possibility" standard had not been met.

The court of appeals sweeps this point aside in a footnote; it asserts that "[t]o find much fault with the inquiry in this case would unduly hinder a district court's ability to detect and rectify a juror's refusal to obey her duty in applying the law to the case and obeying the court's instructions." *Abbell*, 271 F.3d at 1304 n. 20. But the court overlooks the trial court's "equally, if not more, important [duty]--safeguarding the secrecy of jury deliberations." *Thomas*, 116 F.3d at 618. And the court of appeals ignores the dangers that a nullification investigation presents. For example, if the trial court has the discretion to launch an inquiry into nullification during deliberations, "the threat of an interview with the judge could be used by those jurors who seek to convince a holdout to go along with the majority's position." Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U. L. Rev. 877, 950 (1999). The possibility of such an interview also will chill deliberations; jurors--particularly those in the minority--will be reluctant to state their views for fear that the majority will report their words to the court as evidence of nullification. *See id.*

The court of appeals similarly fails to recognize that an inquiry by the court into the basis for a particular juror's views, no matter how delicate, inevitably will convey to the jury that the court disapproves of those views. The remaining jurors--who know that the juror under investigation favors acquittal--may well conclude that the court finds that position unreasonable. Such a conclusion would have a powerful impact on the jury, and particularly on any other holdout jurors favoring acquittal. In this case, for example, it is probably no coincidence that Juror Grant (who, with Juror Alfonso, had been a holdout for acquittal) changed her position following the court's inquiry and voted for conviction on two counts. The district court compounded the problem by instructing the jury that Juror Alfonso had been

dismissed because of her "views of the jury process" and "her own feelings." R168-9118-19; *see United States* v. *Hernandez*, 862 F.2d 17, 24 (2d Cir. 1988) (condemning instruction that criticized dismissed juror).

Third, the court of appeals' opinion undermines the substantive protections of the *Brown/Thomas* standard. The court compounds its error in adopting the wrong legal standard by affording almost complete deference to the district court's determination on that issue. *E.g.*, *Abbell*, 271 F.3d at 1302-03. Such deference conflicts with *Brown*, *Thomas*, and *Symington*. Those cases make clear that, although the court of appeals reviews the district court's removal decision for abuse of discretion, the "any possibility" standard marks the limit of that discretion. If the district court removes a juror accused of nullification where there is "any possibility" that the removal request results from the juror's view of the evidence, the court necessarily abuses its discretion. *See, e.g.*, *Symington*, 195 F.3d at 1085.

To ensure strict compliance with the "any possibility" standard, the *Brown*, *Thomas*, and *Symington* courts each conducted a thorough, independent review of the evidence to determine whether that standard had been satisfied. *See, e.g.*, *Symington*, 195 F.3d at 1088; *Thomas*, 116 F.3d at 623-24; *Brown*, 823 F.2d at 596-97. By contrast, the court of appeals in this case engaged in a cursory analysis aimed solely at determining whether the record contained some evidence--however sparse--to support the district court's removal decision. The court notes, for example, that "[s]ome jurors indicated that they were outraged by Alfonso's decision to do her nails during deliberations" and that "Juror Alfonso's own testimony on her commitment to following the law was not certain." *Abbell*, 271 F.3d at 1303. But the court ignores testimony by Jurors Grant (R167-8934-35) and Butler (R167-8976-87) that Juror Alfonso was following the law and considering the evidence (R166-8861, 8864), and it ignores Juror

Alfonso's insistence that her disagreements with the other jurors stemmed from the application of her common sense and life experiences to the testimony (*e.g.*, R166-8849, 8852-53, 8856-57). Had the Eleventh Circuit conducted the analysis that *Brown*, *Thomas*, and *Symington* require to ensure compliance with the "any possibility" standard, it would not have ignored this evidence, and it certainly would not have given decisive significance to Juror Alfonso's decision to do her nails or to the alleged lack of "certain[ty]" in her testimony about her willingness to follow the law.

Apart from creating a conflict with three other circuits, the court of appeals' excessive deference to the district court's removal decision represents unwise policy. The institutional pressure on trial judges to complete cases and move their dockets provides a powerful incentive for a court faced with an ambiguous record to conclude that a juror intends to nullify and thus to remove the juror. *See* Marder, *supra*, 93 Nw. U. L. Rev. at 951. In this case, for example, the district court referred several times to the time, effort, and money that the case had consumed. *E.g.*, R16-2181 at 24-25; R165-8633. When the issue concerning Juror Alfonso first surfaced, the court rejected defense counsel's objections to an investigation: "We have been at this for, excluding matters between trials and before trials, we have been at this for 8 months almost in trial. I totally disagree with the concept that we are at a point where we ought to do nothing. . . . I am going to do something." R164-8538-39. The court's desire "not . . . to let this case go down easily," R165-8633, undoubtedly affected its conclusion that Juror Alfonso should be excused. Moreover, in interviewing the jurors--and particularly the allegedly nullifying juror--"[t]here is a danger that the judge will be guided by his or her views of what the appropriate outcome of the case should be and may be more likely to dismiss a juror whose views do not accord with those of the judge." Marder, *supra*, 93 Nw. U. L. Rev. at 949-50. For these reasons, and to ensure protection of the

defendant's constitutional and statutory right to a unanimous verdict, an appellate court should conduct an independent review of the record to determine whether the district court complied with the "any possibility" standard. The court of appeals failed to conduct that independent review here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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